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SUPREME COURT, U.S.

NO. 83-5209

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STEPHEN TODD BOOKER,

Petitioner,

-v-

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May a capital defendant be cross-examined at the sentencing phase of his trial concerning highly unreliable information regarding his alleged prior bad acts when the information on which the questions were based was obtained from the defendant involuntarily by a psychiatrist examining him pursuant to a court order and, thus, in violation of the fifth and fourteenth amendments?

2. Does the presentation of such highly unreliable information regarding a capital defendant's alleged prior bad acts as an aggravating factor by the prosecutor conflict with the reliability required for capital sentencing by the eighth and fourteenth amendments?

3. Did the Eleventh Circuit err in upholding jury instructions that a reasonable juror might well have understood to preclude consideration of nonstatutory mitigating circumstances through:

(i) a disregard of Sandstrom v. Montana, 442 U.S. 510 (1979), thus creating a conflict with the Fifth Circuit's condemnation of identical jury instructions in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); and

(ii) a failure to recognize that instructional error under Lockett v. Ohio, 438 U.S. 586 (1978), infects a capital sentencing trial with prejudice sufficient to satisfy the requirements of Wainwright v. Sykes, 433 U.S. 72 (1977), and United States v. Frady, 456 U.S. 152 (1982)?

4. Does the Florida Supreme Court's systematic, secret, ex parte solicitation and consideration of extra-record, prison-generated psychological evaluations and similar materials of questionable reliability concerning capital appellants in cases pending before it for sentencing review violate the fifth, sixth, eighth, and fourteenth amendments?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner, STEPHEN TODD BOOKER, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed April 25, 1983. Rehearing was denied on June 6, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 703 F.2d 1251 (11th Cir. 1983), and is set out at pages 1a-11a of the Appendix.*/ The order denying rehearing is noted at 708 F.2d 734 (11th Cir. 1983).

JURISDICTION

The judgment and opinion of the court of appeals were filed on April 25, 1982, and petitioner's timely petition for rehearing was denied on June 6, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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*/ Citations to the Appendix accompanying this petition are designated __a. Citations to the record of the state trial are designated by R. __. Citations to the transcript of the sentencing proceeding before the judge are designated by S.P. __.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fifth amendment to the Constitution which provides in relevant part:

> No person ... shall be compelled in any criminal case to be a witness against himself ...;

the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense;

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ....

It also involves Section 921.141, Florida Statutes (1973), which is set out at pp. 12a-13a of the Appendix.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Petitioner was convicted of first degree murder, sexual battery, and burglary on June 19, 1978, and sentenced to die. His conviction was affirmed. Booker v. State, 397 So.2d 910 (Fla.), cert. denied, 454 U.S. 957 (1981). He joined the class of death sentenced prisoners that unsuccessfully petitioned the Florida Supreme Court for relief based on that court's consideration of extra-record psychological material in affirming death sentences. Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S.

1000 (1981).

Petitioner's execution was set for April 22, 1982. On April 13, he filed a writ of habeas corpus in the Northern District of Florida. It was denied. The Eleventh Circuit granted a stay pending appeal. Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982). The panel opinion on the merits rejected petitioner's claims. Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983). Rehearing was denied on June 6, 1983. Booker v. Wainwright, 708 F.2d 734 (11th Cir. 1983).

B. Facts Relevant to the Questions Presented

(1) Petitioner's Challenge to the Use in Cross-examination at the Penalty Phase of Highly Unreliable Information Obtained from him Involuntarily by the Psychiatrist Examining him for Competency Pursuant to a Court Order in Violation of the Fifth and Fourteenth Amendments:

Petitioner Stephen Todd Booker was convicted of the rape/murder of a ninety-four year old woman. Booker has a history of mental illness, psychiatric hospitalization, alcoholism, and drug abuse that goes back to age 13. He was first hospitalized at the ages of 13 and 15 in New York. At nineteen, he was hospitalized at Camp Codie Medical Center on Okinawa while he was in the service. He was hospitalized at Camp Codie again the same year. R. 586-87. He was a psychiatric patient at Walter Reed in Washington for two months in 1973, where he was diagnosed as suffering from paranoid schizophrenia and organic brain syndrome. Id.; R. 476-77. He was hospitalized twice more while in the service: at Fort Dix in both 1973 and 1974. After discharge, he was hospitalized again in New York. R. 586-87.

At the time of his arrest, petitioner "confessed" to the interrogating officer, Detective Price. Price testified that Booker only talked about himself in the third person after he had been transformed into Aniel, "who he also described as a demon

R. 375. As the officer described it, the transformation would begin with Booker working himself up into a frenzy. R. 377. His eyes would become glassy. R. 376-77. As Aniel, "his teeth were clenched tightly until they would crack.... I could hear them crunch. He would whisper through his teeth, and I would have to lean forward toward him in order to hear." R. 376. When the officer questioned him about Aniel, "he would burst into tears and cry. And he would laugh and wipe his tears away in a split second. He would then settle back in the chair, face me again, and be in a word, calm." R. 378.

Price also testified that when he spoke to him after the "confession," Booker did not recall having told him about Aniel. Price testified that Booker only remembered the crime when he assumed the personality of Aniel, R. 380-81, and that Booker seemed truthful and sincere both as Booker and as Aniel. R. 381. Finally, Price testified that he discovered that the name "Aniel" was derived from the Latin for doddering old woman. Id.

Because of this "bizarre behavior" and Booker's attempted suicide,[1/] the Alachua County Circuit Court ordered that

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1/ The suicide note, which was produced by the state in discovery and made part of the record on appeal to the Florida Supreme Court, began: "There is but one way to stop this raging inside me. I'm an unwilling subject for some strange test or something...." It contains several references to "this devil [which] is attempting to come forth again and subdue me permanently and place me in the extreme evident state of insanity," "the ranting beast that walks inside me," "this demon," and the "invisible forces like the beast." Amended Answer to Demand for Discovery, Feb. 16, 1978. The note also recounts that Booker "dreamed that the beast took me to the very throne of the devil and we talked about all that I knew. I did not mention it to the person in the cell with me, but he asked me where I went that night fore [sic] he had climbed off the top bunk the [sic] use the toilet and said I was not there." Id. Booker also wrote an unintelligible prayer on the wall of his cell and drew four crosses in blood on the walls. Id.

Booker be hospitalized and examined by two psychiatrists to determine his competency to stand trial and his sanity at the time of the crime. The two psychiatrists were unable to reach a conclusion regarding sanity. 703 F.2d at 1253. A third psychiatrist was then appointed. He too was unable to reach a conclusion regarding petitioner's sanity. R. 477-78, 482.

At the sentencing phase, Booker took the stand and described his history of hospitalization for psychiatric illness. He testified that he did not remember committing the crime he was convicted of, but that he would feel remorse if he did. R. 584. He also testified that he has had problems with memory lapses since age 13 and that three of the eight hospitalizations were for that reason. R. 587.

On cross-examination, the prosecutor inquired about alleged acts of violence during the course of robberies of houses of prostitution while Booker was in the service on Okinawa.

> Q. Do you have problems with acts of violence while you were in the service?
>
> A. Yes. I did.
>
> Q. Other than these for fighting, have you ever attempted to kill people?
>
> Q. While you were in Okinawa in the houses?
>
> A. Could be?
>
> Q. Do you know what I am talking about, Mr. Booker?
>
> A. Yes.
>
> Q. I'm talking about houses of prostitution. Did you ever try to kill anybody over there?
>
> A. Not necessarily. I used to -- we used to rob cat houses.
>
> Q. What weapons did you use to hit people with?
>
> A. Claw hammer.

Q. How many people do you think you hit with the claw hammer?

A. I can't recollect.

Q. More than five?

A. I would say about five.

Q. More than ten?

A. No.

R. 841-42. The prosecutor also inquired about the number of Article 15 disciplinary actions and courts-martial Booker had. Booker answered 11 and 1, respectively. R. 590. A check of the Army records by the probation officer who did the presentence report, however, showed that Booker only had one Article 15 and no military record concerning the alleged robberies and assaults on Okinawa. S.P. at 24-25. Because this information only came out in the presentence report before the judge, the jury that rendered the advisory death sentence never knew of the unreliability of this information.

The prosecutor also cross-examined Booker regarding his recollection of his thoughts on the day of the murder. R. 844-45; 703 F.2d at 1258. The information that formed the basis of both portions of the cross-examination was obtained from the psychiatrist that examined Booker. R. 629-30; 703 F.2d at 1256-57. It is not disputed that the psychiatrists who examined Booker did not warn him regarding his rights as required by Estelle v. Smith, 451 U.S. 454 (1981).[2/]

In the Eleventh Circuit, the state argued that any claim concerning the violation of Booker's fifth amendment rights by the use of this information was barred under Wainwright v. Sykes, 433 U.S. 72 (1977). The court of appeals held that it was not barred because the issue was dealt with by the Florida Supreme Court on the

2/ Smith was given retroactive effect in Battie v. Estelle, 655 F.2d 692 (5th Cir. 1982).

merits of the constitutional claim. 703 F.2d at 1255 (citing County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979)). Moreover, the trial record reveals that an objection was made. R. 629.

On the merits, the court of appeals accepted the factual premises of Booker's claim.[3/] It accepted the fact that the information that formed the basis of the two challenged portions of the cross-examination of petitioner was obtained in violation of the fifth amendment under Estelle v. Smith. 703 F.2d at 1258-59. And it accepted the fact that the introduction of the sanity issue at trial did not waive petitioner's fifth amendment rights with respect to the use of material subject to the privilege at the sentencing phase to obtain his death. Nevertheless, it held that the questioning of petitioner based on illegally obtained information was permissible under the doctrine of Harris v. New York, 401 U.S. 222 (1971), that prior inconsistent statements obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), could be used for impeachment. The panel went on to note that the cross-examination did not rise to the level of a constitutional violation but was, at most, objectionable as being outside the scope of direct. 703 F.2d at 1258.

(2) Petitioner's Challenge to the Presentation of such Highly Unreliable Information as an Aggravating Factor in Violation the Eighth and Fourteenth Amendments:

While this cross-examination was only allowed as proper impeachment, there was no limiting instruction to the jury that it should consider the testimony regarding the prior bad acts only on the issue of credibility. The prosecutor, moreover, invited both the jury and the trial judge to consider that testimony in imposing sentence. He told the jury that: "First, mitigation can be that the defendant has no significant history of prior criminal activity.

3/ Booker was denied a hearing in the federal district court.

That's not true in this case. You have heard the testimony." R. 611 (emphasis added). He reaffirmed that thought to the sentencing judge. S.P. at 40. And he specifically suggested to both the jury and the sentencing judge that the petitioner would continue his violent ways unless finally "deterred" by the death penalty. R. 605; S.P. at 45.[4/]

The record suggests that the jury was affected by the testimony of the alleged prior violent acts. Booker's lawyer argued it to the trial judge, specifically noting the physical reaction of many of the jurors when that testimony was adduced. S.P. at 24-25, 25-26. Even the prosecutor, whose personal speculation was that the jury was just as impressed with other testimony, agreed that the Okinawa testimony did tend to "show a background of bad character." Id. at 39-40.

In the Eleventh Circuit, petitioner argued that the presentation of the alleged prior acts of violence as an aggravating circumstance introduced arbitrary and unreliable considerations into the sentencing process because this information lacked the reliability of evidence of prior convictions. The Eleventh Circuit rejected this claim on two grounds. First, it noted that the jury had been instructed to consider only the statutory aggravating circumstances. The court refused to assume that the jury would disregard those insructions. 703 F.2d at 1259. However, it did not consider the prosecutor's express invitation to the jury to do just that. Second, it found "no hint in the record" that the jury

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4/ The prosecutor told the jury: "I know it [the death penalty] is a deterrent from that killer ever killing again." R. 605. To the judge, he argued "that rehabilitation for him is not a realistic goal an he [the defendant] tells you that twenty-five years will not help to change that realism that he will kill again." S.P. at 45. To the extent that such "realism" was the result of Booker's mental illness, the prosecutor "attached the 'aggravating' label ... to conduct that actually should militate in favor of a lesser penalty...." Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891, 4897 (June 22, 1983).

would have considered the alleged prior acts of violence as an aggravating circumstance. Id.

(3) Petitioner's Challenge to Instructions That Might Well Lead a Reasonable Juror to Conclude That the Jury was Forbidden to Consider Relevant Mitigating Circumstances.

This issue is substantially similar to the question presented in the petition for a writ of certiorari in Ford v. Strickland, No. 82-6923, filed in this Court on June 14, 1983. In this case, the instructions to the jury at the penalty phase were that:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence.... [The court listed the statutory aggravating circumstances]
>
> The mitigating circumstances you may consider if established by the evidence are as follows.... [The court listed the statutory mitigating circumstances]

R. 623, 625. Unlike Ford, however, there is nothing in this record that suggests that the trial judge considered nonstatutory mitigating factors, that he understood they could be considered, or that such an impression was conveyed to the jury.

There was no contemporaneous objection to these instructions. In federal habeas, petitioner argued that he had not commited a procedural default because the instructions were consistent with Florida law and federal constitutional doctrine as they existed at that time. Under Cooper v. State, 336 So.2d 1133 (Fla. 1976), Florida law limited consideration to statutory mitigating circumstances. See Barclay v. Florida, ___ U.S. ___, 51 U.S.L.W. 5206, 5212, n.3 (July 6, 1983)(Stevens, J., concurring); Perry v. State, 395 So.2d 170, 174 (Fla. 1981) (in excluding nonstatutory mitigating evidence under Cooper, trial judge "followed the law as he believed it was being interpreted at the time of trial"). Petitioner's trial was held before the decisions in Lockett v. Ohio,

438 U.S. 586 (1978), and Songer v. State, 365 So.2d 696 (Fla. 1978), which set the matter straight as a matter of both Florida and federal constitutional law.

The court of appeals rejected this claim based on the decision in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)(en banc). 703 F.2d at 1259-60.

(4) Petitioner's Challenge to the Florida Supreme Court's Ex Parte Solicitation, Receipt, and Consideration of Evaluative Materials Concerning Capital Defendants Whose Appeals Were Before the Court:

Since at least as early as 1975, the Supreme Court of Florida has, without the knowledge of the appellants or their counsel, requested, received, and considered materials from prison officials relating to death-sentenced appellants in pending appeals. The existence of this practice has never been disputed. It is clear in this case that the Florida Supreme Court reviewed at least one document regarding Mr. Booker: a post-sentence, prison-generated psychological report.

Mr. Booker was one of the petitioners in the original habeas filed in the Florida Supreme Court. Brown v. Wainwright, 392 So. 2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981). The Eleventh Circuit rejected Mr. Booker's Brown claim based on the decision in Ford v. Strickland. Booker, 703 F.2d at 1260.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS MISAPPLIED THE DECISIONS OF THIS COURT WHEN IT UPHELD THE CROSS-EXAMINATION OF A CAPITAL DEFENDANT AT THE SENTENCING PHASE CONCERNING HIS ALLEGED PRIOR BAD ACTS BASED ON INFORMATION THAT WAS OBTAINED FROM THE DEFENDANT INVOLUNTARILY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

This case presents important questions regarding the application of this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), holding that statements obtained from a capital defedant by a court appointed psychiatrist cannot be used against him at the penalty phase. It does so in a uniquely compelling factual context, that of a chronically mentally ill defendant. The court below held that such statements could be used for impeachment purposes under Harris v. New York, 401 U.S. 222 (1971), on the theory that they were only the fruit of a violation of Miranda v. Arizona, 384 U.S. 436 (1966). Moreover, it held that whatever harm was occasioned by this cross-examination was not of constitutional dimension, but was, at most, objectionable as beyond the scope of direct.

In concluding that this case was governed by Harris, the court below erred in three critical ways. First, statements obtained during a court ordered psychiatric examination in the absence of warnings and a voluntary waiver are not the result of a mere Miranda violation; they are coerced, involuntary statements in the truest sense. This is particularly true in the context of a mentally debilitated defendant. As such, they cannot be used for impeachment. New Jersey v. Portash, 440 U.S. 450 (1979). Second, because of petitioner's debilitated mental state and the coercive nature of the questioning, his inherently unreliable statements could not be used for impeachment because they lacked the indicia of trustworthiness relied on in Harris. Mincey v. Arizona, 437 U.S. 385 (1978). Finally,

the statements could not have been admissible as proper impeachment under Harris if, as the court below held, they were beyond the scope of the petitioner's direct testmony.

A. The Use of Petitioner's Statements to Impeach Him Is Prohibited by New Jersey v. Portash and Mincey v. Arizona

In Harris, the Court held that statements made to the police in the absence of Miranda warnings could be used for impeachment, "provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224. "In Harris ..., the Court expressly noted that the defendant made 'no claim that the statements made to the police were coerced or involuntary.'" Portash, 440 U.S. at 458 (quoting Harris, 401 U.S. at 224). This case presents the question of the constitutionality of the use of statements that fail to meet either of the Harris caveats.

In Portash, the statements to be used for impeachment were first made before a grand jury under subpoena and a grant of immunity. The Court distinguished Harris, holding that:

> The Fifth and the Fourteenth Amendments provide that no person "shall be compelled in any criminal case to be a witness against himself." As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial. "But any criminal trial use against the defendant of his involuntary statement is a denial of due process of law."

Portash, 440 U.S. at 459 (quoting Mincey, 437 U.S. at 398) (emphasis in original).

In Portash, the Court barred the use of compelled statements for impeachment even if they were reliable. 440 U.S. at 459 ("The Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination"). In Mincey, the Court decided the easier question: whether

statements that are truly involuntary and, thus, inherently unreliable may be used for impeachment. In Mincey, the Court held that a defendant could not be impeached with his prior inconsistent statements when they were obtained from him after Miranda warnings but in the absence of a waiver while he was in a hospital bed in critical condition. As noted above, the Court held that "any criminal trial use against a defendant of his involuntary statement is a denial of due process...." 437 U.S. at 398 (emphasis in original). It reversed the Arizona Supreme Court's holding that Mincey's statement was admissible as impeachment under Harris. It noted that: "Statements made by a defendant in circumstances violating Miranda v. Arizona, supra, are admissible for impeachment if their 'trustworthiness ... satisfies legal standards.'" Id. (quoting Harris, 401 U.S. at 224). Since, however, it found that "Mincey's statements to Detective Hust were not '"the product of a rational intellect and a free will,"' ... his conviction cannot stand." Id., 437 U.S. at 397-98 (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

Petitioner's statements in this case were compelled, involuntary, and unreliable. Thus, they were not admissible as impeachment under Harris. Here, the statements that formed the basis of the cross-examination were coerced in the truest sense, since the petitioner was examined by the doctors pursuant to a court order. This was recognized quite clearly in Estelle v. Smith itself. There, the Court held that

> when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to [the doctor] were not "given freely and voluntarily without any compelling influences...."

451 U.S. at 469. The degree of compulsion is inescapably greater here; Booker had a long history of mental illness and, thus, was significantly less able to resist the compulsion of the

court order and the intrusive inquisitiveness of a psychiatric examination.

Petitioner Booker's statements fall in the same category as Mincey's. Booker may not have been as "debilitated and helpless" as Mincey was physically. But to place a person of Booker's chronically debilitated mental condition under court order to talk to a psychiatrist and then say that his statements were "the product of a rational intellect and a free will" is to deny reality. See Blackburn v. Alabama, 361 U.S. 199, 207-208 (1960). As the Court noted in Blackburn,

> a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

Id. That sense of justice should be revulsed if a human being were to be sent to his death on that basis.

The record, moreover, provides adequate corroboration of the unreliability of Booker's statements when given under coercive or difficult conditions. Placed under oath and subjected to hostile cross-examination, Booker "freely" admitted to fifteen Article 15's while in the service. In fact, however, he had only one. Similarly, when under court order, he told the psychiatrist of several violent assaults while in Okinawa. But none is confirmed in his military record.

In sum, the court below erred in applying Harris. Under Mincey, the impeachment use of petitioner's involuntary and unreliable statements requires reversal. Even if petitioner's statements are somehow not deemed unreliable, Portash requires reversal

because the use of petitioner's compelled statements violates the plain terms of the fifth amendment.

B. The Cross-Examination that Occurred in this Case is not Sanctioned by Harris

The court below held that the cross-examination did not rise to the level of a constitutional violation, that the questions relating to the alleged events on Okinawa were objectionable merely as outside the scope of direct. But if that is so, then that portion of the cross-examination cannot possibly be justified under Harris.

The Harris doctrine rests on the premise that: "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U.S. at 226. But that is not what occurred here. By conceding that the cross-examination relating to the alleged Okinawa incidents was outside the scope of direct, the court below necessarily conceded that the cross-examination was not used to impeach any attempted perjury. Rather, it was used in a plain, old fashioned attempt to prejudice the jury by impeachment relating to prior bad acts.

The court below simply missed the well established distinction that:

> It is derogative of the search for truth to allow a defendant to tell his story of innocence without facing him with evidence impeaching that story. A basic premise of our adversary system of justice is that the truth is best obtained by requiring a witness to explain contrary evidence if he can. As we have seen, for this reason the defendant who chooses to testify waives his fifth amendment privilege with respect to relevant cross examination. This is not to say that merely by taking the stand a defendant opens himself to the introduction of evidence that is relevant solely to his propensity to commit bad acts or crimes.

United States v. Beechum, 582 P.2d 898, 909 (5th Cir. 1978) (en

banc) (emphasis added).[4/] This is the clear purport of United States v. Nobles, 422 U.S. 225, 240 (1975), that a witness only waives the "privilege to resist cross-examination on matters reasonably related to those brought out in direct examination." Id. The privilege is only waived vis-a-vis "proper questioning," United States v. Havens, 446 U.S. 620, 627 (1980); the Harris rule can only apply "to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination." Id. Since the defendant did not open the issue of his propensity for violence on direct, the cross-examination had nothing to do with truthfulness or the combating of perjury. It was, simply, the prejudicial use of prior bad acts to attack the witness's credibility. Not only does such cross-examination impermissibly trench on the fifth amendment privilege, it also violates due process by placing before the jury information regarding prior bad acts that is not truly probative of the issues before it but is, nevertheless, highly prejudicial. See discussion, infra, Point II.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE PRESENTATION BY A PROSECUTOR OF A CAPITAL DEFENDANT'S ALLEGED PRIOR BAD ACTS AS AN AGGRAVATING CIRCUMSTANCE DEPRIVES THE CAPITAL DEFENDANT OF THE RELIABLE SENTENCING PROCEDURES REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS

The court below held that the presentation of this unreliable evidence did not create any harm of a constitutional dimension. But allowing the prosecutor to adduce this evidence and then present it as an aggravating factor did destroy the "procedures that are designed to assure reliability in sentencing determinations." Barclay,

---

4/ In Beechum, the court held that the cross-examination was proper because it related to matters that tended to show that the defendant's testimony on direct that he had no intent to commit the crime was not credible. Id.

51 U.S.L.W. at 5211 (Stevens, J., concurring). In Barclay and Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891 (June 22, 1983), the Court upheld death sentences that were based on improper factors that, nevertheless, "plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged." Stephens, 51 U.S.L.W. at 4897-98; Barclay, 51 U.S.L.W. at 5210. Here, however, the improper factor placed before the sentencer was improperly adduced and, in any case, substantially unreliable.

As indicated above, petitioner's alleged prior bad acts were either improperly adduced in violation of the fifth amendment or, as the court below concluded, as cross-examination outside the scope of direct. Thus, this case starts off on quite different footing than either Barclay or Stephens. Moreover, unlike Barclay or Stephens, the source of the information concerning the petitioner's alleged prior acts of violence was not ordinarily reliable prior convictions. Rather, the source was statements he made while under psychiatric examination and possible mental illness; the unreliability of these statements stems both from the involuntary nature of the admissions and the unreliable nature of the source, the chronically mentally ill petitioner. Indeed, these statements about crimes committed in the Army are not borne out by his service record; a fact that the jury that rendered petitioner's death sentence never knew.

The court below nevertheless concluded that petitioner was not harmed because, in part, the jury had been instructed to consider only statutory aggravating circumstances. This conclusion cannot stand for three reasons.

First, as noted above, the prosecutor expressly invited both the jury and the judge to consider these alleged prior acts of

violence as an aggravating factor. Second, the record supports the the inference that they were affected by this information. S.P. 24-25, 25-26. Indeed, even the prosecutor admitted that, while he thought the jury was more impressed with other evidence, this matter did tend to weigh in aggravation. Id. at 39-40.

Third, the fact that the jury was told to consider only the statutory circumstances in aggravation in the weighing part of the process does not diminish the harm that this unreliable evidence created. The court below declined "to posit a per se rule" of harm based on the introduction of such evidence which would "presume that the jury did not follow the court's instructions...." 703 F.2d at 1259. But in assuming that the jury is restricted to only the statutory factors -- either as a matter of law or practice, the court below misconceived the dynamics of the sentencing process. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, ___ U.S. ___, 51 U.S.L.W. 5220, 5225 (July 6, 1983). This is Justice Stevens's "third stage" in the sentencing process. Barclay, 51 U.S.L.W. at 5212 n. 3. Given the open-ended nature of the deliberative process, the presumption of no error indulged by the court below, 703 F.2d at 1259, is particularly inappropriate.

Mindfull that "although not every imperfection in the deliberative process is sufficient, even in a death case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim...," Stephens, 51 U.S.L.W. at 4897, petitioner respectfully submits that the Court should grant the writ to determine whether the deliberate presentation of such unreliable evidence as an aggravating factor violates

the "need for reliability in the determination that death is the appropriate that death punishment in" this case. Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER INSTRUCTIONS TO THE JURY AT THE SENTENCING PHASE THAT A REASONABLE JUROR MIGHT WELL HAVE UNDERSTOOD TO LIMIT HIM OR HER TO ONLY THE STATUTORY MITIGATING FACTORS VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

This question is substantially the same as that presented in the petition for certiorari in Ford v. Strickland, No. 82-6923, filed on June 14, 1983. Accordingly, petitioner will not burden the Court with a repitition of the reasons for granting the writ. Petitioner respectfully requests the Court to review the arguments set out in Ford in support of Booker's petition.

One additional point bears mentioning. In their concurring opinion in Barclay, Justices Stevens and Powell seem to acknowledge that prior to the Florida Supreme Court's opinion in Songer v. State, 365 So.2d at 700, Florida law prohibited the consideration of nonstatutory mitigating factors at the second third or any other stage. 51 U.S.L.W. at 5212 (citing Cooper v. State, 336 So.2d at 1142). The plain language of Cooper confirms this, the post-Lockett opinion in Songer notwithstanding. In Cooper, the Florida Supreme Court affirmed the refusal of a proffer of nonstatutory mitigating evidence on the following basis:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. ... [T]he Legislature chose to list the mitigating circumstanes which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.

Cooper, 336 So.2d at 1139 (quoting State Dixon, 283 So.2d 1, 7 (Fla. 1973)).

IV. THE FLORIDA SUPREME COURT'S SECRET, EX PARTE SOLICITATION, RECEIPT, AND CONSIDERATION OF REPORTS FROM STATE EXECUTIVE AGENCIES CONCERNING CAPITAL LITIGANTS WHOSE APPEALS WERE THEN PENDING FOR SENTENCING REVIEW PRESENT VITAL CONSTITUTIONAL QUESTIONS WHICH SHOULD BE RESOLVED BY THIS COURT

Again, this question is the same as that presented in the petition in Ford v. Strickland, No. 82-6923, and petitioner respectfully requests the Court to consider the reasons offered in support of the granting of the writ in Ford as if fully set out herein.

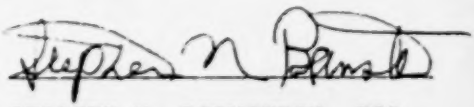
It should be pointed out, however, that the recent opinions of the Court in Barclay on the operation of the Florida statute bear significantly on the Brown issue as presented in Ford and Booker. In upholding the death sentence in Barclay despite the consideration of improper factors, both the plurality and concurring opinions relied on the role of the Florida Supreme Court in reviewing such sentences as an important safeguard. The plurality canvassed the Florida case law and concluded that "the Florida Supreme Court does not apply its harmless error rule in an automatic or mechanical fashion ... [but] examine[s] the balance struck by the trial judge...." 51 U.S.L.W. at 5211. The concurring opinion quoted this Court's understanding in Proffitt v. Florida, 428 U.S. 242 (1976), that "the evidence of aggravating and mitigating circumstances is reviewed and reweighed by the Florida Supreme Court 'to determine independently whether the imposition of the ultimate penalty is warranted.'" 51 U.S.L.W. at 5215 (quoting Proffitt, 428 U.S. at 253, and Songer v. State, 322 So.2d 481, 484 (1975)). But the conception of the role of the Florida Supreme Court in reviewing death sentences considered by the Eleventh Circuit in Ford and the Florida Supreme Court itself in Brown in upholding the ex parte practice now under challenge is diametrically opposed to the conception of that role held by this Court, reached only after studying the Florida case law.

Plainly, the receipt and consideration of sensitive, ex parte reports by the Florida Supreme Court could have and would have had a material impact on that court's role as a reweigher and reviewer of death sentences. That is particularly true in a case such as this where the defendant's mental state was relevant to two issues under consideration by that court: the cross-examination issue and the question whether there were any mitigating circumstances to be considered as part of the harmless error analysis under Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977). Booker v. State, 397 So.2d at 913-14, 918. Equally plainly, it violated the Constitution. "Because of the potential that the [re]sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliablity in capital sentencing dictate[s] that the death penalty be reversed." Ramos, 51 U.S.L.W. at 5224 (describing Gardner v. Florida, 430 U.S. 349 (1977)) (emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Counsel for Petitioner

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83-5207

NO. ~~82-5460~~

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

STEPHEN TODD BOOKER,

Petitioner,

vs

LOUIE WAINWRIGHT,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, STEVEN TODD BROOKER, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the Petitioner, who is presently incarcerated at the Florida State Penitentiary, Starke, Florida. Mr. Brooker's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

STEPHEN N. BERNSTEIN, ESQ.
609 NE First Street
Post Office Box 1642
Gainesville, Florida 32602
(904) 373-9555
Attorney for Petitioner

83-5309

RECEIVED
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SUPREME COURT, U.S.

NO. ~~82-5468~~

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

STEPHEN TODD BOOKER,

Petitioner,

vs

AFFIDAVIT

LOUIE WAINWRIGHT,

Respondent.

STATE OF FLORIDA:
COUNTY OF ALACHUA:

BEFORE ME, the undersigned authority, personally appeared STEPHEN N. BERNSTEIN, who, being duly sworn upon oath states:

1. I am an attorney for Stephen Todd Booker, the Petitioner in the above captioned action, and I make this affidavit in support of Mr. Brooker's Motion for Leave to Proceed in Forma Pauperis. My representation of Mr. Booker is without remuneration.

2. Mr. Booker is presently in the custody of the State of Florida and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Booker by me and will be forwarded to the Court immediately upon receipt. A copy of the Affidavit to be signed by Mr. Booker is attached hereto.

3. Counsel was appointed to represent Mr. Booker at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Booker is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Booker is entitled to redress in this action.

STEPHEN N. BERNSTEIN

SWORN TO AND SUBSCRIBED before me this 5th day of August, 1983.

Notary Public, State
of Florida at Large

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES AUG 11, 1986
BONDED THRU GENERAL INS. UNDERWRITERS

RECEIVED
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SUPREME COURT, U.S.

No. 82-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STEPHEN TODD BOOKER, :

Petitioner, :

v. :

LOUIE L. WAINWRIGHT, Secretary Florida Department of Corrections, :

Respondent. :

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA)
) ss:
COUNTY OF BRADFORD)

I, Stephen Todd Booker, being duly sworn, depose and say in support of my motion for leave to proceed without being required to prepay fees or costs and to proceed in forma pauperis:

1. I am the petitioner in the above noted action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, I was represented by appointed counsel because I am indigent.

5. I believe I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Circuit Court of Alachua County, a trial court of the State of Florida, of murder and was sentenced to death. I am being held at the Florida State Prison at Starke, Florida. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

_____
STEPHEN TODD BOOKER

STATE OF FLORIDA
COUNTY OF BRADFORD

The foregoing affidavit of Stephen Todd Booker was subscribed and sworn before me this ____ day of _____, 1983.

_____
Notary Public

Stephen Todd BOOKER, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, Respondent.

No. 82-5468.

United States Court of Appeals, Eleventh Circuit.

April 25, 1983.

Petitioner appealed from an order of the United States District Court for the Northern District of Florida, Lynn C. Higby, J., which denied his petition for habeas corpus relief. The Court of Appeals, Fay, Circuit Judge, held that: (1) where state court did not make explicit whether it was considering federal constitutional provision or its state constitutional counterpart, and cited cases construing both, federal habeas court would view the state court as having treated the issue as to whether petitioner's privilege against self-incrimination was violated by prosecutor's use of information derived from a psychiatric examination as arising under both federal and state law for *Sykes* purposes, and (2) in murder trial, prosecutor's use of information derived from a psychiatric examination of petitioner for purposes of impeaching his testimony during penalty phase did not violate his constitutional right against self-incrimination.

Affirmed.

1. Habeas Corpus ⇐45.3(1)

When state courts do not indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for state by entertaining the claim.

2. Habeas Corpus ⇐45.3(1)

Where state court did not make explicit whether it was considering federal constitutional provision or its state constitutional counterpart, and cited cases construing both, federal habeas court would view the state court as having treated the issue as to whether petitioner's privilege against self-incrimination was violated by prosecutor's use of information derived from a psychiatric examination as arising under both federal and state law for *Sykes* purposes. U.S.C.A. Const.Amend. 5; West's F.S.A. Const. Art. 1, § 9.

3. Witnesses ⇐301

Neither accused's mere submission to a psychiatric or psychological examination, nor fact that his counsel may have requested an examination foreclosed his claim that his constitutional privilege against self-incrimination was violated by prosecutor's use, in cross-examining accused, of information allegedly gained from his psychiatric examination. U.S.C.A. Const.Amend. 5.

4. Witnesses ⇐300

In murder trial, prosecutor's use of information derived from a psychiatric examination of accused for purposes of impeaching his testimony during penalty phase did not violate his constitutional right against self-incrimination. U.S.C.A. Const.Amend. 5.

5. Habeas Corpus ⇐85.1(2)

Federal habeas court would presume that jury in petitioner's murder trial followed trial court's instructions listing the aggravating circumstances and specifically

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limiting jury's consideration to those circumstances rather than invalidating imposition of death penalty on basis that introduction of evidence of petitioner's prior acts of violence might have been interpreted as a nonstatutory aggravating circumstance upon which jury relied.

6. Habeas Corpus ⇐85.5(8)

Petitioner failed to carry his burden of establishing that trial court's instructions to jury during advisory sentencing proceedings improperly limited jury's consideration of nonstatutory mitigating factors in deciding whether to recommend life or death.

7. Criminal Law ⇐1128(4)

Florida Supreme Court's solicitation of ex parte psychological material concerning petitioner in reviewing his murder conviction was not unconstitutional.

Appeal from the United States District Court for the Northern District of Florida.

Before FAY and VANCE, Circuit Judges, and ALLGOOD *, District Judge.

FAY, Circuit Judge:

Stephen Todd Booker appeals the district court's denial of his petition for habeas corpus challenging his sentence of death imposed pursuant to Florida Statute Section 921.141 (1977). On appeal, Booker advances four contentions: 1) the prosecutor's use of information derived from a psychiatric examination in cross examination of Booker during the penalty phase violated his fifth amendment rights; 2) the prosecutor's introduction of evidence concerning Booker's prior acts of violence permitted the jury to consider a nonstatutory aggravating circumstance; 3) the state trial court improperly limited the jury's consideration of nonstatutory mitigating factors; and 4) the Florida Supreme Court's solicitation of ex parte psychological material concerning Booker was unconstitutional. After a careful consideration of Booker's claims on appeal, we affirm the denial of the petition for habeas corpus.

I. FACTUAL BACKGROUND

Booker was convicted on June 19, 1978 in the state court of first degree murder, sexual battery and burglary based upon evidence which showed that Booker entered the Gainesville, Florida apartment of Lorine DeMoss Harman, a ninety-four year old woman, raped Harman and stabbed her repeatedly in the chest and neck causing her death. Booker was connected to the crime by body hair samples, fingerprints, and testimony concerning the print pattern of his shoes. Further, Booker "confessed" to a Gainesville police detective. This "confession" occurred while Booker was describing himself in the third person as Steve and calling himself "Aniel," which he spelled out for the detective and described as a demon.[1] While Booker was "Aniel,"

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

1. The detective explained Booker during this time as follows:

> Prior to the time that he became Aniel he would chant. And the chanting would go on for perhaps ten seconds, 15 seconds, not long. It was during this time that the glassy eyes appeared. He had the glassy eye appearance. He would then settle, be serene, smile, and in my terminology clench his teeth. The grinding would stop, but his teeth would clench, and in that form he would begin to whisper things that I had to lean forward to hear.

the detective asked him if "Stephen had done it," and Booker replied, "He did it, God damn it, he did it." There is no contention that the confession was involuntary and in fact, its substance was adduced during cross examination of the detective by Booker's attorney.

After Booker was duly indicted by the grand jury and a public defender appointed to represent him, defense counsel filed a motion for mental examination and notice of defense of insanity. (State Record at 4). A county judge granted the motion, committing Booker to an intake facility of the Department of Health and Rehabilitative Services to determine whether he was competent to participate in his own defense and appointing Jose Lineas, M.D. and George Barnard, M.D. to examine Booker as to his sanity or insanity at the time of the offense. (State Record at 9). Thereafter, both the state and defendant filed separate motions to appoint an additional psychiatrist to examine Booker on the grounds that the previously appointed doctors were unable to reach a conclusion regarding Booker's sanity at the time of the offense. (State Record at 32, 36). The state court appointed Dr. Frank Carrera to examine Booker. (State Record at 45). Dr. Carrera testified during the defendant's case and Dr. Barnard testified during the state's rebuttal case.

The case was submitted to the jury after three days of trial proceedings. The jury deliberated for slightly in excess of three hours and returned verdicts of guilty on all three counts. The next day, the advisory sentencing proceedings occurred.[2] The only evidence introduced by the state at this time was a document relating to Booker's prior conviction for robbery. The only evidence[3] introduced by the defense was the testimony of Booker. Booker also made a statement prior to counsel's arguments on sentencing.[4] After hearing counsel's arguments and receiving the trial judge's instructions, a majority[5] of the jurors recommended the death sentence.

In October 1978, the trial judge had before him a presentence investigation re-

> As my questioning related toward Aniel and who Aniel was, how he became acquainted with Aniel, and so on, as my questions grew more direct, he would burst into tears and cry. And he would laugh and wipe his tears from his eyes in a split second. He would then settle back in the chair, face me again, and be in a word, calm. He was rational in all aspects. Nothing was not understandable with the exception of the chant.
> (Transcript of Trial Proceedings, Vol. IV., p. 627).

2. Pursuant to Fla.Stat. Section 921.141 (1977), the court was required, upon the defendant's conviction of a capital felony, to conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. After hearing all the evidence, the jury deliberates and renders an advisory sentence to the court of either death or life imprisonment.

3. The jury, however, is not restricted to evidence presented during the penalty phase in arriving at its advisory sentence and may consider evidence presented throughout the trial.

4. Booker, against the advice of his attorney, made the following statement to the jury:

> You people in the jury box have convicted me of first degree murder, sexual battery, and burglary. And you are going in the room and deliberate over what punishment should be given for a crime of this nature. A defendant found guilty of such a crime should receive the death penalty. That's it.
> (Transcript of Trial Proceedings, Vol. V., p. 850).

5. Unlike the verdict, the advisory sentence of the jury need not be unanimous. Fla.Stat. Section 921.141(3) (1977). The jury considering Booker's sentence voted nine to three to impose the death sentence. (Transcript of Trial Proceedings, Vol. V., p. 886).

port, the psychological report of Dr. Elizabeth MacMahon, certain medical records, a letter from Booker and the sentencing memoranda of counsel, as well as the recommendation of the jury and the oral arguments of counsel. The trial judge considered the statutory aggravating and possible mitigating factors and sentenced Booker to death for the murder of Lorine DeMoss Harman,[6] entering his written order in accordance with Fla.Stat. Section 921.141(3) (1977). (State Record at 142). *See also, Booker v. State*, 397 So.2d 910, 915–918 (Fla.1981).

Booker appealed to the Florida Supreme Court which affirmed the conviction and sentence. *Booker v. State*, 397 So.2d 910 (Fla.), *cert. denied*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). Booker also joined 122 other death row inmates in petitioning the Florida Supreme Court for extraordinary relief based on that court's possible consideration of extra-record psychological material in affirming the sentences. The Florida Supreme Court denied relief, *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981), and the United States Supreme Court denied certiorari, *Brown v. Wainwright*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

On March 22, 1982, the Governor of Florida signed a death warrant authorizing Booker's execution by electrocution on April 21. On April 13, Booker filed a petition for writ of habeas corpus in the district court for the Northern District of Florida, alleging various grounds for relief and including a prayer for stay of execution. The district court denied the stay orally on April 15 and by a summary order on April 19. (Record at 260). The district court filed its order denying petition for writ of habeas corpus on April 20. (Record at 261). Booker filed a notice of appeal and an application for certificate of probable cause and to proceed on appeal in forma pauperis (Record at 260), as well as an order denying Booker's application for certificate of probable cause and to proceed on appeal in forma pauperis (Record at 273). In any event, appeal was taken to the Eleventh Circuit, which issued an order granting stay. *Booker v. Wainwright*, 675 F.2d 1150 (11th Cir.1982).[7] We now consider the merits of Booker's claims on appeal.

II. USE IN CROSS EXAMINATION OF PSYCHIATRIC EXAM INFORMATION

A. The Procedural Bar

On this appeal, Booker claims that his privilege against self incrimination was violated when the prosecutor utilized information during cross examination of Booker's penalty phase testimony which was derived from a psychiatric examination. Booker contends that since the constitutional protections mandated by *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), were not afforded Booker, his death sentence must be vacated.

6. The trial judge also sentenced Booker to a fifty-five year term for sexual battery and to a thirty year term for burglary, both sentences to run consecutively.

7. The Eleventh Circuit panel noted:

> In the limited time available to this court to examine the procedure, it is unclear whether or not the district judge granted or denied petitioner's application for certificate of probable cause to appeal, there being in the papers furnished to us what appears to be an order granting same and another order of denial, both dated April 19, 1982. Petitioner alleges that the certificate of probable cause was denied.

675 F.2d at 1151.

The state, however, argues that we are barred from considering the merits of Booker's *Estelle v. Smith* claim in a habeas proceeding pursuant to 28 U.S.C. Section 2254 by the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Sykes*, the United States Supreme Court held that a habeas corpus petitioner must show "cause and prejudice" in order to advance in federal court those claims barred from consideration in the state courts by a valid procedural rule. The United States Supreme Court recently reaffirmed the *Sykes* doctrine in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), recognizing that the costs of the federal writ of habeas corpus "are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts." 456 U.S. at 128, 102 S.Ct. at 1572.

The state argues that Booker's counsel did not adequately object at trial. During oral argument on this appeal, Booker's counsel, who has represented Booker throughout the state and federal proceedings, argued that the objection at trial was sufficient. Both parties also devoted considerable attention in their respective briefs to the "cause and prejudice" exception to *Sykes*.

[1] One rationale for the *Sykes* doctrine is the integrity of the state court trial. "The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Sykes*, 433 U.S. at 90, 97 S.Ct. at 2508. However, equally important underpinnings of the *Sykes* doctrine are considerations of comity and federalism. As recently stated in *Isaac*, without *Sykes'* requirement that defense counsel present constitutional claims during trial, the state appellate courts would not have a "chance to mend their own fences and avoid federal intrusion." *Isaac*, 456 U.S. at 129, 102 S.Ct. at 1572.

Considerations of comity and federalism have resulted in the development of a well settled exception to the procedural default rule of *Sykes:* where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable. As explained by the United States Supreme Court, when the state courts do not indicate that a "federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979). The former Fifth Circuit recognized this exception and applied it in numerous cases.[8] *See e.g., Sassoon v. Stynchombe*, 654 F.2d 371, 374 (5th Cir.1981); *Moran v. Estelle*, 607 F.2d 1140, 1142 (5th Cir.1979); *Cannon v. State of Alabama*, 558 F.2d 1211, 1216 n. 12 (5th Cir.1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978).

[2] The state contends that Booker did not adequately object at trial or present his federal constitutional claim on appeal to the Florida Supreme Court. The state further contends that no exception is applica-

8. We are bound by the precedent of the former Fifth Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981).

ble because "it is clear from the Florida Supreme Court's opinion that this issue was treated as a question of state evidentiary law rather than a federal constitutional question." (Brief of Appellee at 20, n. 3). We do not agree.

The Florida Supreme Court described Booker's position on appeal thusly:

> The defendant contends that during the sentencing proceedings the court committed error in permitting the prosecutor to ask questions based on information gathered from court ordered psychiatric reports. The defendant argues that this violated his right against self-incrimination.

397 So.2d at 913. The Florida Supreme Court also noted that:

> The defendant recognizes that a court ordered psychiatric examination generally is not considered violative of defendant's right to freedom from compelled self-incrimination [9] and that psychiatrists may render opinions concerning sanity based on factual statements made by the defendant.

Id. In both the above references to the right against self incrimination, the right is referred to generally, without denominating whether it is specifically the right embodied in the Fifth Amendment to the United States Constitution or Florida Constitution, Article 1, Section 9. Booker's Initial Brief to the Florida Supreme Court mentions both sources *initially* and then refers to the right generally. In deciding the dispositive issue, the Florida Supreme Court concluded:

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

397 So.2d at 914. By relying on *Harrison*, which did not concern Florida's privilege against self-incrimination,[10] the Florida Supreme Court was apparently considering both the state and federal constitutional privileges against self-incrimination. We therefore conclude that where a state court does not make explicit whether it is considering the federal constitutional provision or its state constitutional counterpart, and cites cases construing both, we will view the state court as having treated the issue as arising under both federal and state law for *Sykes* purposes. To hold otherwise would be to sanction an imprecision in jurisprudence intolerable in the realm of constitutional issues and to foreclose federal habeas review of federal claims because the language used by the state courts was vague.

Having decided that we are not barred by the procedural default doctrine of *Sykes*, we proceed to consider Booker's claim concerning the use of the psychiatric exam on the merits.

B. The Substantive Claim

Booker asserts that under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68

9. This was the state of the law prior to *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

10. Harrison was convicted of murder in the District of Columbia and the Court was construing the Fifth Amendment to the United States Constitution.

L.Ed.2d 359 (1981), his constitutional privilege against self-incrimination was violated by the prosecutor's use of information allegedly gained from a psychiatric examination of Booker. In *Smith*, the United States Supreme Court held that

> when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to [the doctor] were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the state did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them.

Id. at 469, 101 S.Ct. at 1876. There is no contention that Booker was given *Miranda* or other suitable warnings before making statements to the psychiatrists who examined him.

[3] Neither Booker's mere submission to a psychiatric or psychological examination, nor the fact that the defense may have requested an examination forecloses his claim under *Smith*. *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir.1981). In *Battie*, however, the former Fifth Circuit distinguished a situation where the government used the results of a court-appointed psychiatric examination only after the defense had introduced psychiatric testimony in order to raise a mental defect defense, *citing*, *United States v. Cohen*, 530 F.2d 43 (5th Cir.) *cert. denied*, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976).[11] *Battie* approved *Cohen's* holding that "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." *Battie*, 655 F.2d at 702.

[4] In Booker's case, the issue of insanity was raised as a defense and a psychiatrist testified on behalf of the defendant. Thus, under *Battie*, there was a waiver of defendant's fifth amendment privilege as to psychiatric testimony. However, the jury had already rejected Booker's defense of insanity by finding him guilty on all three counts of the indictment and the use of the psychiatric testimony occurred during the subsequent penalty phase of the trial. We need not decide whether such a waiver under *Battie* during trial survives in the separate penalty proceeding in a capital case, since there is another determinative factor in Booker's situation.

Booker took the stand to testify during the advisory sentencing proceedings of the state trial. In answer to his attorney's specific inquiry as to whether he had a recollection of the day of the crime, Booker said he did not remember. Booker also testified that he had been in various hospitals, including Camp Codie Medical Center on Okinawa and Walter Reed Medical Center in Washington, D.C. while he was in the armed services. The following colloquy then occurred between Booker and his attorney:

11. Writing five years prior to *Estelle v. Smith*, the Fifth Circuit in *Cohen* stated

> [w]e have never reached the issue of whether a defendant's privilege against self-incrimination is violated per se by a court ordered psychiatric examination solely to determine the accused's mental condition at the time of the commission of the offense. Several other circuits have rejected this unconstitutionality-per-se argument on various grounds, while one has indicated approval of it. Relying on a balancing test, we choose to follow the former line of cases and permit compelled psychiatric examinations when a defendant has raised the insanity defense. [footnotes omitted].

530 F.2d at 47.

Q: Have you had any difficulties during this time you were hospitalized from the time you were 13 until now with periods of time which you can't remember?

A: Yes, sir. Three of these occasions of hospitalization, that was the reason for being in the hospital.

Q: That you couldn't remember what had happened to you?

A: Yes, sir.

(State Transcript at 838). On cross examination, the prosecutor questioned Booker about his military service:

Q: Do [sic] you have problems with acts of violence while you were in the service?

A: Yes. I did.

Q: Other than these for fighting, have you ever attempted to kill people?

Q: While you were in Okinawa in the houses?

A: Could be.

Q: Do you know what I am talking about, Mr. Booker?

A: Yes.

Q: I'm talking about houses of prostitution. Did you ever try to kill anybody over there?

A: Not necessarily. I used to—we used to rob cat houses.

Q: What weapons did you use to hit people with?

A: Claw hammer.

Q: How many people do you think you hit with the claw hammer?

A: I can't recollect.

Q: More than five?

A: I would say about five.

Q: More than ten?

A: No.

(State Transcript at 841–42). Later, Booker's attorney objected to the prosecutor's questions relating to the day of the crime. The trial court overruled the objection on the grounds that the question of lapse of memory on the day of the incident was opened by the defendant on direct. The cross examination continued:

Q: Mr. Booker, my question to you was do you remember when you got up at 7:00 or 7:30 feeling that morning like you wanted to kill somebody?

A: Part of the way, yes.

Q: Did you know Mrs. Harman prior to this date?

A: No. I didn't.

Q: Had she ever done anything to you in her life to deny you anything or prevent you from anything?

A: No. In regards to me knowing her, I still don't know her. I have just been confronted with her in this courtroom in this charge.

Q: Did you attempt to kill anybody else that day; do you remember that?

A: Sure, I remember.

Q: Do you remember you did?

A: No. I didn't try to kill anybody that day.

Q: In the morning?

A: Right.

Q: You did not?

A: No. I didn't.

Q: Did you think about doing it?

A: Sometime I did, but I gave up the idea because it was crazy.

(State Transcript at 844–45)

Booker contends, and we assume without deciding, that the prosecutor obtained the information about the Okinawa houses of prostitution and Booker's state of mind upon waking on the day of the crime

through information given to a psychiatrist [12] without the constitutional safeguards of *Estelle v. Smith*.[13] Yet even assuming Booker's statements would not have been admissible in the state's case, there is no constitutional prohibition against using the information for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).[14] In *Harris*, the United States Supreme Court reasoned:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [citations omitted]. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could be laid before the jury by way of cross examination and impeachment.
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.

401 U.S. at 225–6, 91 S.Ct. at 645–646. Since "the holding in *Smith* followed logically from the *Miranda* decision itself," *Battie* 655 F.2d at 699, it is likewise logical to conclude that the shield provided by *Smith* is also not susceptible to being perverted into a license to use perjury free from permissible impeachment.

While the prosecutor's questions concerning events on Okinawa may have been susceptible to an objection as being outside the scope of direct examination,[15] the cross examination questions do not rise to the level of a constitutional violation [16] and relief in a federal habeas action is therefore not warranted.

III. PRIOR ACTS OF VIOLENCE

[5] Booker contends that the Okinawa activities elicited on cross examination of

12. The Florida Supreme Court found that "the record does not conclusively show that the state attorney secured this information from the psychiatric reports." 397 So.2d at 914.

13. We have previously decided that *Smith* should be given retroactive effect. *Battie v. Estelle*, 655 F.2d at 699.

14. *See also, Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), (use of prearrest silence to impeach defendant does not violate privilege against self incrimination); *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980), (evidence suppressed as fruit of unlawful search and seizure may be used to impeach defendant's testimony given on cross examination).

15. The Florida Supreme Court, however, held that:

> The defendant opened up the question of what he remembered and whether he did or did not remember certain things. The trial court was correct in ruling that the state attorney had a right to inquire as to what defendant remembered, as this was an issue presented by the defendant during the sentence proceedings.

397 So.2d at 914.

16. *Cf., Harris v. Spears*, 606 F.2d 639 (5th Cir. 1979), where we affirmed the granting of the writ of habeas corpus on the basis of the prosecutor's cross examination questions to defendant concerning statements attributed by implication to defendant's son. We stated "The constitutional error occurred, however, not when the questions were asked, but when the son was not called." *Id.* at 643. In *Harris*, the sixth amendment right to confrontation was determinative, a factor not applicable in *Booker*, since what is involved is Booker's statements.

Booker during the advisory sentencing proceeding requires granting of the writ on another basis. In *Henry v. Wainwright*, 661 F.2d 56 (5th Cir.1981),[17] we held that it is constitutional error to allow a jury in a capital case to consider nonstatutory aggravating factors in deciding whether the death penalty should be imposed. Booker seeks to extend *Henry* to situations where the jury is properly instructed to consider only statutory aggravating factors but evidence of a nonstatutory aggravating factor has been presented to the jury.

To adopt Booker's theory would be to presume that the jury did not follow the court's instructions listing the aggravating circumstances and specifically limiting the jury's consideration to those circumstances. There is no hint in the record that the jury would have construed the Okinawa impeachment testimony as a nonstatutory aggravating factor. We decline to posit a per se rule to the effect that the introduction of any evidence that might *possibly* be interpreted as a nonstatutory aggravating circumstance renders the imposition of the death penalty unconstitutional notwithstanding specific instructions limiting the jury's consideration to the enumerated statutory aggravating factors.

IV. JURY INSTRUCTIONS ON NONSTATUTORY MITIGATING FACTORS

[6] Booker argues that the trial court's instructions to the jury during the advisory sentencing proceedings improperly limited the jury's consideration of nonstatutory mitigating factors. The state argues that our consideration of this issue is barred by the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Booker concedes procedural default as to the jury instructions, but contends that he comes within the cause and prejudice exception to *Sykes*.

This issue is controlled by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc). In *Ford*, the trial judge similarly instructed the jury to consider *only* the enumerated aggravating factors and, omitting the "only," to consider the following mitigating factors. *Ford* also conceded procedural default in *Sykes*. In *Ford*, we stated:

> The *Sykes* issue becomes blurred in this case, however, because of two principles which mesh to deny Ford relief on this point. First, the Supreme Court has held that an erroneous jury instruction satisfies *Sykes'* prejudice prong only if actual, not possible, prejudice is shown so that there is '*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.' *United States v. Frady*, 456 U.S. 152, 168, 102 S.Ct. 1584, 1595, 71 L.Ed.2d 816, 832 (1982).
>
> Second, in evaluating a trial court's instructions, we must determine the interpretation a reasonable juror might give the words of the instruction in question. *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The entire charge must be

17. This Unit B case decided November 12, 1981, is binding precedent for the Eleventh Circuit. *See, Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982). *Henry* was vacated and remanded to the Eleventh Circuit by the United States Supreme Court, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326, for further consideration in light of *Engle v. Isaac*. On remand, we found that the issue was properly before us and adhered "to our earlier judgment that the state trial court committed constitutional error by allowing the non-statutory aggravating circumstances to be placed before and considered by the jury at Henry's sentencing hearing." *Henry v. Wainwright*, 686 F.2d 311, 315 (5th Cir.1982) (Unit B).

examined as a whole to discern whether the issues and law presented to the jury were adequate. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981).

The fundamental issue then is whether Ford has carried his burden in establishing that his jury perceived that in deciding whether to recommend life or death, it was denied the use of any nonstatutory mitigating factors.

696 F.2d at 812. As in *Ford*, we conclude that Booker has not carried his burden in establishing the jury perceived that in deciding to recommend life or death, it was denied the use of any nonstatutory mitigating factors. *Ford* set forth four reasons for this conclusion. Three of those reasons are applicable to Booker's case and bear repeating:

> *[F]irst*, the trial court read the statute as written, setting forth the entire list of statutory mitigating circumstances, which statute omits the word 'only.' The Supreme Court has recognized the Florida statute does not limit a jury's consideration of mitigating circumstances to those listed in the statute. *Proffitt v. Florida*, 428 U.S. [242] at 250 n. 8, 96 S.Ct. [2960] at 2965 n. 8 [49 L.Ed.2d 913].
>
> *Second*, the instruction here was different from *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), where the state trial judge concluded the charge with these words:
>
> > If you unanimously find from the testimony that *one or more of the preceding elements of mitigation* exist[s], then you must consider whether *it* outweighs the aggravating circumstances you previously found and you must return one of the following verdicts....
>
> *Id.* at 1368 (emphasis added). Here the jury was not confined to two 'preceding elements of mitigation,' as in *Washington*.
>
> *Third*, that petitioner was not limited in the introduction of evidence which might be considered mitigating and that the jury arguments encompassed all evidence introduced in the case explains counsel's perception that the jury was not denied the use of any evidence in weighing sentences. Thus had petitioner known of *Lockett [v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973], he would still have no reason to object because the jury was not in fact being limited to what it could consider.

Id. at 812-13. As in *Ford*, the rational conclusion is that the jury did not perceive a restriction on the consideration of any mitigating circumstances.

V. NONRECORD MATERIAL BEFORE THE FLORIDA SUPREME COURT

[7] The final issue raised by Booker concerning the Florida Supreme Court's consideration of nonrecord material is also controlled by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983) (en banc), where we stated:

> But even if members of the [Florida Supreme] court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it should not be so used, and the rejection of the notion that it affected the judg-

ment of the reviewing judges of the court ends the matter when addressed at the constitutional level.

Id. at 811. We note only that Booker's attorney was furnished with the Florida Supreme Court's request of Booker's presentence investigation report, thus rendering this factual situation even weaker than *Ford*.

VI. CONCLUSION

Based on the foregoing, the district court's denial of the petition for writ of habeas corpus is AFFIRMED.

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921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) **Separate proceedings on issue of penalty.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **Advisory sentence by the jury.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **Findings in support of sentence of death.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

Pages misnumbered in original copy.

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) **Review of judgment and sentence.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **Aggravating circumstances.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) **Mitigating circumstances.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, *eff.* Dec. 8, 1972. Amended by Laws 1974, c. 74-379, § 1, *eff.* Oct. 1, 1974; Laws 1977, c. 77-104, § 248, *eff.* Aug. 2, 1977; Laws 1977, c. 77-174, § 1, *eff.* Aug. 2, 1977; Laws 1979, c. 79-353, § 1, *eff.* July 3, 1979.

Laws 1972, c. 72-724, § 9, substantially rewrote this section.

Laws 1974, c. 74-379, § 1, added the third sentence to subsec. (1).

Laws 1977, c. 77-104, a reviser's bill corrected errors and deleted obsolete or expired provisions. See Reviser's Note—1977.

Laws 1977, c. 77-174, a reviser's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

Laws 1979, c. 79-353, substituted in the fifth sentence of subsec. (1) "to the nature of the crime and the character of the defendant" for "to sentence", deleted in subsecs. (2)(b) and (3)(b) "as enumerated in subsection (6)", and added subsec. (5)(i).

Reviser's Note—1977:

Conforms internal references to editorial reassignment of subsections created by s. 9, ch. 72-724, Laws of Florida.